80-1707

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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

LEVERAGE FUNDING SYSTEMS, INC.,
a corporation,
CENTAUR FILMS, a corporation,
PETER S. TRAYNOR, an individual,
WILLIAM G. McDONALD, JR.,
an individual,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDICES FOR PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RICHARD H. KIRSCHNER, Esq.
PAUL FITZGERALD, Esq.

RICHARD H. KIRSCHNER,
A Professional Corporation

10850 Wilshire Boulevard
Fourth Floor
Los Angeles, CA 90024
(213) 474-6555

Attorneys for Petitioners

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Argued and Submitted May 7, 1980

Decided October 3, 1980

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellant,	)
	)
vs.	)
	)
LEVERAGE FUNDING SYSTEMS, INC., a corporation, CENTAUR FILMS, a corporation, PETER S. TRAYNOR, an individual, WILLIAM G. McDONALD, JR., an individual,	)
	)
Defendants-Appellees.	)

No. 79-1677

Appeal from the United States District Court for the Central District of California

Before: FARRIS and NELSON, Circuit Judges, and JAMESON,* District Judge.

*The Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

FARRIS, Circuit Judge:

The United States appeals the district court's dismissal of a 29-count indictment against Leverage Funding Systems, Centaur Films, Peter Traynor and William McDonald for mail fraud and fraud in the offer and sale of securities. The government contends that the district court erred in ruling that the indictment must be dismissed because fewer than twelve of the grand jurors returning the indictment attended every grand jury session. We reverse.

On February 27, 1979, the defendants were indicted by a federal grand jury on 29 counts of mail fraud and fraud in the offer and sale of securities in violation of 18 U.S.C. § 1341 and 15 U.S.C. §§ 77q(a) and 77x. At the defendants' request, the district court required the government to disclose the grand jury voting and

attendance records. Those records revealed that of the 19 grand jurors who unanimously voted to indict, 9 were present at all 13 grand jury sessions, 5 were present at 12 sessions, 2 were present at 11 sessions, 2 were present at 9 sessions, and the remaining juror was present at 6 sessions.

On September 5, 1979, the defendants moved to dismiss the indictment, contending that their Fifth Amendment rights were violated because fewer than 12 of the grand jurors who returned the indictment were present at every grand jury session. The district court agreed and dismissed the indictment, concluding that "an indictment is valid under the Fifth Amendment and Fed.R.Crim.P. 6(f) only if at least twelve jurors attend all sessions at which the grand jury

hears evidence on the proposed indictment." United States v. Leverage Funding Systems, Inc., 478 F.Supp. 799, 800 (C.D. Cal. 1979).

We do not question the necessity for an independent and informed grand jury. See Wood v. Georgia, 370 U.S. 375, 390-93, 82 S.Ct. 1364, 1373-74, 8 L.Ed.2d 569 (1962). The grand jury stands between the accusor and the accused and represents the primary security to the innocent against hasty, malicious and oppressive prosecution. Id. at 390, 88 S.Ct. at 1373. See also Branzburg v. Hayes, 408 U.S. 665, 686-88, 92 S.Ct. 2646, 2659-60, 33 L.Ed.2d 626 (1972). Whether this function can be performed by grand jurors who have not heard all the evidence presented by the prosecution is the subject of this dispute.

The identical question was before the Second Circuit in United States ex rel. McCann v. Thompson, 144 F.2d 604 (2d Cir.), cert. denied, 323 U.S. 790, 65 S.Ct. 313, 89 L.Ed. 630 (1944). Judge Learned Hand, writing for the court, concluded:

> "Since all the evidence adduced before a grand jury--certainly when the accused does not appear--is aimed at proving guilt, the absence of some jurors during some part of the hearings will ordinarily merely weaken the prosecution's case. If what the absentees actually hear is enough to satisfy them, there would seem to be no reason why they should not vote. Against this we can think of nothing except the possibility that some of the evidence adduced by the prosecution might conceivably turn out to be favorable to the accused; and that, if the absentees had heard it, they might have refused to vote a true bill. No one can be entirely sure that this can never occur; but it appears to us so remote a chance that it should be left to those instances in which it can be made to appear that the evidence not heard was of that character, in spite of the extreme difficulty of ever

> "proving what was the evidence before a grand jury. Indeed, the possibility that not all who vote will hear all the evidence, is a reasonable inference from the fact that sixteen is a quorum."

Id. at 607. See also United States v. Colasurdo, 453 F.2d 585, 596 (2d Cir. 1971), cert. denied, 406 U.S. 917, 92 S.Ct. 1766, 32 L.Ed.2d 116 (1972). Although no other circuit has expressly decided the issue, we have cited McCann favorably. See Lustiger v. United States, 386 F.2d 132, 139 (9th Cir. 1967), cert. denied, 390 U.S. 951, 88 S.Ct. 1042, 19 L.Ed.2d 1142 (1968).

Our independent review leads us to the same result as that reached by the Second Circuit. The Fifth Amendment provides in part that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand

Jury . . . ." This right is implemented by Rules 6(a) through 6(f) of the Fed.R. Crim.P. Rule 6(a) provides that a "grand jury shall consist of not less than 16 nor more than 23 members." Rule 6(f) provides that an "indictment may be found only upon the concurrence of 12 or more jurors." Neither the Fifth Amendment nor Rule 6(f) expressly states whether a grand juror must hear all the evidence presented before he or she can cast a valid vote for indictment.

This court must give effect to the express terms of Rules 6(a) and 6(f) unless such an interpretation would frustrate the purpose of the rules (i.e. implementation of the grand jury provision of the Fifth Amendment.) See, e.g., Trans Alaska Pipeline Rate Cases, 436 U.S. 631, 643, 98 S.Ct. 2053, 2061, 56 L.Ed.2d 591 (1978); Commissioner

v. Brown, 380 U.S. 563, 571, 85 S.Ct. 1162, 1166, 14 L.Ed.2d 75 (1965). A literal interpretation of Rules 6(a) and 6(f) indicates that an otherwise valid indictment will not be dismissed if (1) the grand jury returning the indictment consisted of between 16 and 23 jurors, (2) every grand jury session was attended by at least 16 jurors, and (3) at least 12 jurors vote to indict. Nothing more is required unless the Fifth Amendment requires more.

Leverage Funding contends that the district court's ruling is correct. Otherwise, a juror who did not attend every session might have been absent during the presentation of exculpatory evidence. Leverage Funding apparently reasons that a grand juror can only fulfill his or her constitutional role

if he or she hears all the evidence, both inculpatory and exculpatory, which is presented by the prosecution. We disagree.

We understand Leverage Funding's concern, but the purpose of the grand jury indicates that a juror's absence during the presentation of exculpatory evidence is not a proper ground to invalidate that juror's vote for indictment. It is the function of the grand jury to determine whether the evidence presented in a specific case is sufficient to establish probable cause to believe that a crime was committed and that a specific individual committed the crime. Bracy v. United States, 435 U.S. 1301, 1302, 98 S.Ct. 1171, 1172, 55 L.Ed.2d 489 (1978); Costello v. United States, 350 U.S. 359, 362, 76 S.Ct. 406, 408, 100 L.Ed. 397 (1956). The grand jury is not to weigh evidence to determine

guilt or innocence. United States v. Salsedo, 607 F.2d 318, 319 (9th Cir. 1979). See United States v. Calandra, 414 U.S. 338, 343-44, 94 S.Ct. 613, 617-18, 38 L.Ed.2d 561 (1974). A grand juror can therefore fulfill his or her constitutional role of determining whether the prosecution has presented a prima facie case even if he or she was absent during the presentation of exculpatory evidence.

In any event, exculpatory evidence will rarely be presented to a grand jury. Because the grand jury's function is limited, the prosecutor has no duty to present evidence in his possession which tends to negate guilt. United States v. Y. Hata & Co., 535 F.2d 508, 512 (9th Cir.), cert. denied, 429 U.S. 828, 97 S.Ct. 87, 50 L.Ed.2d 92 (1976). Further, an accused has no right to be called as a witness

before the grand jury that is considering his or her indictment, United States v. Salsedo, supra, and he or she has "no right of cross-examination, or of introducing evidence to rebut the prosecutor's presentation." United States v. Y. Hata & Co., supra at 512. A juror who is absent during a portion of the prosecution's case will, in all probability, miss only inculpatory evidence. See United States ex rel. McCann v. Thompson, supra at 607.

Leverage Funding also argues that a grand juror who is absent for one or more sessions might miss all the evidence presented by the prosecution in support of an indictment on a particular count. We understand that under the modern practice of presenting grand juries with complex multiple count indictments, Leverage Funding's concern might be valid in some cases. The issue, however, is whether, under the

Fifth Amendment, the possibility that an absent juror might not hear any evidence on a particular count is a sufficient basis to invalidate that juror's vote for indictment. We conclude that it is not.[1/]

The federal grand jury is an independent institution not relegated to a position within any of the three branches

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1/ We recognize that the state of California follows a different rule. People v. Fujita, 43 Cal.App.3d 454, 476-77, 117 Cal.Rptr. 757, 771 (1974), cert. denied, 421 U.S. 964, 95 S.Ct. 1952, 44 L.Ed.2d 451 (1975), holds that twelve jurors voting to indict must have heard the substance of all the evidence. Fujita apparently reflects the special nature of California grand juries. Their function is to weigh all evidence presented, Cal. Penal Code § 939.7 (West 1970); prosecutors must present all known evidence favorable to defendants, Johnson v. Superior Court, 15 Cal.3d 248, 251, 539 P.2d 792, 794, 124 Cal.Rptr. 32, 34 (1975).

of government; it "'is a constitutional fixture in its own right . . ..'" United States v. Chanen, 549 F.2d 1306, 1312 (9th Cir.), cert. denied, 434 U.S. 825, 98 S.Ct. 72, 54 L.Ed.2d 83 (1977), quoting Nixon v. Sirica, 487 F.2d 700, 712 n.54 (D.C. Cir. 1973). Federal courts exercise only a limited "supervisory power" over grand jury proceedings, United States v. Chanen, supra at 1313, and they have no authority to review the sufficiency of the evidence supporting an indictment. United States v. Samango, 607 F.2d 877, 880 n.6 (9th Cir. 1979). The Fifth Amendment bestows upon grand jurors a heavy responsibility, but lacking evidence to the contrary, courts must presume that grand jurors have properly performed their duties. See Ostrer v. Aronwald, 567 F.2d 551, 553-54 (2d Cir. 1977). Courts must also

presume that a grand juror who votes to indict an individual on a particular count has heard sufficient evidence to believe that a trial on that count is warranted. Id. Leverage Funding has cited no authority, and we have found none, which even suggests that the Fifth Amendment requires the abandonment of this presumption unless a grand juror has heard all the evidence presented by the prosecution.

Under the Fifth Amendment and Fed.R. Crim.P. 6(a) and 6(f), an indictment is valid if (1) the grand jury returning the indictment consisted of between 16 and 23 jurors, (2) every grand jury session was attended by at least 16 jurors, and (3) at least 12 jurors vote to indict. Nothing requires that every juror voting to indict attend every session.

Reversed.

NELSON, Circuit Judge, dissenting:

I respectfully dissent. I would affirm and adopt the opinion of the district court judge, reported at 478 F.Supp. 799 (C.D. Cal. 1979).

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

October 17, 1979

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
LEVERAGE FUNDING SYSTEMS, INC., a corporation, CENTAUR FILMS, a corporation, PETER S. TRAYNOR, an individual, WILLIAM G. McDONALD, JR., an individual,	)
	)
Defendants.	)

No. CR 79-159-HP

ORDER DISMISSING INDICTMENT

Before: PREGERSON, District Judge

The Fifth Amendment to the Constitution provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a

presentment or indictment of a Grand Jury . . .." A grand jury consists of up to twenty-three persons, F.R.Crim.P. 6(a), sixteen constituting a quorum. 8 Moore's Federal Practice ¶ 6.02[2], at 6-17 (2nd ed. 1978); see 18 U.S.C. § 3321, F.R.Crim.P. 6(a). For a grand jury to indict, twelve or more jurors must vote to return an indictment. F.R. Crim.P. 6(f). Defendants' motion to dismiss the instant indictment requires the court to address two questions: (1) whether at least twelve of the grand jurors who vote to return an indictment must be informed of all the evidence presented to the grand jury, and (2) whether a grand juror can be considered informed without having attended all sessions at which evidence is presented on the proposed indictment. To preserve

the integrity of the grand jury system, the court rules that an indictment is valid under the Fifth Amendment and F.R. Crim.P. 6(f) only if at least twelve jurors attend all sessions at which the grand jury hears evidence on the proposed indictment. Because this requirement was not met, the indictment must be dismissed.

I. FACTUAL BACKGROUND

On February 27, 1979, a grand jury returned an indictment charging defendants with having committed various felonies under federal law. This grand jury met and heard evidence on thirteen separate days, beginning on May 9, 1978. At each session, sixteen or more jurors were present, out of the twenty that constituted the grand jury. On the thirteenth day, with nineteen jurors

present, the grand jury voted unanimously in favor of indictment. At first blush it would appear that the voting requirement of F.R.Crim.P. 6(f) was satisfied.

An examination of the grand jury attendance chart revealed, however, that of the nineteen jurors voting to return the indictment, only nine had attended each of the previous twelve sessions. The chart showed that ten jurors had missed one or more sessions and therefore were possibly unaware of some of the evidence when they voted. After this information was disclosed, defendants moved to dismiss the indictment. They asserted that only jurors fully aware of the evidence presented can be counted in determining whether the voting requirement of Rule 6(f) has been met. In response, the government asserted that

sixteen of the jurors--a quorum--were sufficiently aware of the evidence because seven of the absentee jurors missed evidence that was assertedly cumulative.[1/] As an alternative, the government also argued that the law does not require that there be a minimum of twelve informed jurors who vote to return an indictment.

II. THE NECESSITY OF AN INFORMED GRAND JURY

To resolve the issues raised, the court must look to the role the grand jury plays in our criminal justice system. Chief Justice Warren, writing for the Supreme Court in Wood v. Georgia, 370 U.S. 375, 390, 82 S.Ct. 1364, 1373,

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1/ Government counsel indicated that on the day the grand jury voted to indict, he did not examine the attendance chart and was thus unaware which jurors had missed previous sessions.

8 L.Ed.2d 569 (1962), eloquently described the grand jury's historic role:

> "[T]his body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.

(Footnote omitted.) See also Stirone v. United States, 361 U.S. 212, 218, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960). Others who have observed the workings of the grand jury system paint a different picture. They say that today the grand jury is a mere servant of the prosecutor and that it does not act as a buffer between the accuser and the accused. They argue that it is the prosecutor who decides which matters will be put before the grand

jury, that it is the prosecutor who decides what evidence will be presented to the grand jury and thus what evidence will be ignored, and--practically and generally speaking--that it is the prosecutor who makes the ultimate decision as to who should be indicted for what. See generally M. Frankel & F. Naftalis, The Grand Jury 22-23 (1977).

There is perhaps a significant gap between the grand jury's historic role and the role the grand jury now plays in our criminal justice system. Of necessity, the grand jury must rely on the evidence presented to it by the prosecutor. Nevertheless, the grand jury has an important role to play, particularly at the federal level where the grand jury is the only potentially neutral body that can protect the individual against

the initiation of arbitrary or malevolent prosecutions. If such a prosecution is started, the innocent may be forced to suffer the serious economic and social harms resulting from the return of the indictment itself.

For the grand jury to fulfill its role as the independent buffer between the accuser and the accused, at least twelve grand jurors who vote to return an indictment should be informed of all the evidence submitted by the prosecutor. Jurors who are ignorant of some of the evidence presented to the grand jury cannot effectively question the validity of the prosecution's case. For example, a juror who missed all the testimony relating to count three of a particular proposed indictment obviously cannot question the validity of that proposed

count. In Wood, Chief Justice Warren aptly spoke of "[t]he necessity to society of an independent and informed grand jury . . . ." 370 U.S. at 390, 82 S.Ct. at 1373.

The Supreme Court's decision in Costello v. United States, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956), does not suggest a different result. In Costello, the Court held that an indictment based entirely on hearsay is valid, if returned by a legally constituted and unbiased grand jury. The Court examined the English origins of our constitutional grand jury and the history of grand jury practice in this country and noted that the grand jury has traditionally convened as a body of laymen free from technical rules of evidence. The Court approved this practice both because the grand jury was intended to operate substantially like its English

progenitor and because challenges based on evidentiary defects would produce burdensome delays in criminal proceedings. Thus, Costello stands only for the proposition that courts should not inquire into the substance of the evidence presented to the grand jury. Courts can still play a role, however, in ensuring the fairness and independence of that body. In re Grand Jury For November, 1974 Term, 415 F.Supp. 242, 244 (W.D.N.Y. 1976). By requiring that grand jurors be informed for their votes to count, this court is not evaluating the sufficiency of the evidence presented. Rather, it is acting to ensure that grand jury proceedings are conducted in a manner that is fair and independent.

The Second Circuit has taken the position, in United States ex rel. McCann v.

Thompson, 144 F.2d 604 (2d Cir.), cert. denied, 323 U.S. 790, 65 S.Ct. 313, 89 L.Ed. 630 (1944), and later in United States v. Colasurdo, 453 F.2d 585 (2d Cir. 1971), cert. denied, 406 U.S. 917, 92 S.Ct. 1766, 32 L.Ed.2d 116 (1972), that it is irrelevant whether the grand jurors who vote an indictment are cognizant of all the evidence, except possibly where exculpatory evidence is introduced. In McCann, defendants argued that the district court should have dismissed the indictment because less than twelve who voted to indict had heard all the evidence. The Second Circuit rejected this argument, stating:

> "Since all the evidence before a grand jury--certainly when the accused does not appear--is aimed at proving guilt, the absence of some jurors during some part of the hearing will ordinarily merely weaken the prosecution's case. If what

> "the absentees actually hear is enough to satisfy them, there would seem to be no reason why they should not vote."

144 F.2d at 607. The Second Circuit further said:

> "Against this [reasoning] we can think of nothing except the possibility that some of the evidence adduced by the prosecution might conceivably turn out to be favorable to the accused; and that, if the absentees had heard it, they might have refused to vote a true bill. No one can be entirely sure that this can never occur; but it appears to us so remote a chance that it should be left to those instances in which it can be made to appear that the evidence not heard was of that character."

Id.

This court cannot adopt the Second Circuit's view. The Second Circuit reasoned that it is not prejudicial for an absentee to vote to indict upon hearing only some of the evidence because the missed evidence which was also aimed

at proving guilt, would not have caused him to change his vote. As the Second Circuit indicated, this reasoning does not hold true where the missed evidence is exculpatory.[2/] The court, however, overlooked the fact that its reasoning also fails where the missed evidence was inculpatory but noncumulative. In such a situation, the absentee grand juror would be voting to indict without having heard evidence relating to elements of some of the crimes charged, or without

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2/ Since 1977, Justice Department policy requires a prosecutor "in many circumstances" to present exculpatory evidence to the grand jury. For example, if a prosecutor is personally aware of substantial evidence that directly negates the guilt of the target of the investigation, the prosecutor must present that evidence to the grand jury before seeking an indictment. United States Attorneys' Manual, Title 9, § 9-11.334 (August 1, 1979). Ordinarily a prosecutor should also give the target the opportunity to testify before the grand jury. Id. at §§ 9-11.252-.253.

having heard evidence relating to entire counts of the indictment. Clearly, it is unfair to count that grand juror's vote as one of the twelve necessary to return an indictment.

Thus, the Second Circuit's reasoning arguably holds true only where the absentee grand juror misses cumulative inculpatory evidence. Here, the government made a painstaking analysis in an attempt to demonstrate that seven of the absentee jurors in fact missed only cumulative inculpatory evidence. But to allow challenges to jurors only where it can be showr that they missed exculpatory evidence, or noncumulative inculpatory evidence, would involve the courts in lengthy, burdensome analysis of the evidence presented to grand juries and would "bog down the courts in a morass, a veritable jungle of speculation and

conjecture." United States v. Colasurdo, 453 F.2d at 596. Such analyses would constitute the kind of preliminary trials that Costello warned against. Therefore, it is preferable to adopt a bright line rule that requires a court to discount the vote of an uninformed grand juror. Moreover, respect for the grand jury as an institution and basic notions of justice and fair play require that the vote of a grand juror be counted only when he is informed of all the evidence presented, irrespective of whether the missed testimony was cumulative or noncumulative. It is well established that "to perform its high function in the best way 'justice must satisfy the appearance of justice.'" In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed.

942 (1954).[3/]

Having established the necessity for informed jurors, the court now rules that to be considered an informed juror, one

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3/ The one decision by the Ninth Circuit that addresses the informed juror question is ambiguous. In Lustiger v. United States, 386 F.2d 132 (9th Cir. 1967), cert. denied, 390 U.S. 951, 88 S.Ct. 1042, 19 L.Ed.2d 1142 (1968), the defendant alleged that, at each grand jury session, more than sixteen but less than all the grand jurors were present. The court held that this allegation did not provide a basis for dismissing the indictment because: "Individual grand jurors comprising more than a quorum attended all sessions, and were present when the vote was taken on the indictment." Id. at 139. The use of the word "individual" suggests that, in Lustiger, the same sixteen (or more) individual jurors attended all grand jury sessions. Thus, one could argue that Lustiger holds that an indictment is valid only when a quorum of the grand jury is cognizant of all the evidence at the time of voting. On the other hand, after making the above quoted statement, the Ninth Circuit cited the Second Circuit's decision in McCann, prefacing the citation with the signal "see." This suggests an endorsement of the Second Circuit's position. Faced with these conflicting possible interpretations of the holding in Lustiger, this court does not find the case controlling here.

must attend all sessions at which evidence is presented on the proposed indictment. This requirement cannot be met by having absentee jurors read the transcripts of missed sessions.4/ The grand jury is a creature of the Constitution, entrusted with an important and powerful role in our criminal justice system. The grand jury's role is to stand as the buffer between the accuser and the accused. It performs this role when it

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4/ Rule 6(e) of the Federal Rules of Criminal Procedure now requires that all grand jury proceedings, except for deliberations and voting, be recorded stenographically or by an electronic device. 47 U.S.L.W. 4488 (1978) (effective August 1, 1979). Though this Rule was not in effect when the grand jury heard the evidence in this case, the government nevertheless had the proceedings recorded. Even if a juror could be considered an informed juror by reading the transcripts of sessions missed, the absentee jurors here (with the possible exception of one juror) did not read the necessary transcripts.

is asked by the prosecutor to exercise its power to bring charges against individuals for serious crimes. Having this power imposes on the grand jury the responsibility to conduct its proceedings with the highest degree of fairness. An appearance of fairness is lacking when an indictment is voted by a grand jury lacking at least twelve members who have attended all sessions. Through their attendance at every session grand jurors not only inform themselves of the evidence but also demonstrate both to those under investigation and to society their commitment to analyze and act on that evidence in a reasoned and responsible manner.[5/]

5/ The court's holding is not at odds with the Ninth Circuit's decision in United States v. Chanen, 549 F.2d 1306 (9th Cir.), cert. denied 434 U.S. 825,
(Continued)

It has been argued that it is unduly burdensome to require that at least twelve of the jurors who vote to indict attend all grand jury sessions. United States ex rel. McCann v. Thomson, 144

5/(Continued)

98 S.Ct. 72, 54 L.Ed.2d 83 (1977). Chanen held that, in the circumstances of that case, the government could secure an indictment by reading transcripts of sworn testimony to the grand jury instead of presenting live witnesses. Cf. United States v. Helstoski, ___ U.S. ___, 99 S.Ct. 2432, 61 L.Ed.2d 12 (1979). In Chanen, it appears that each grand juror was present when all the evidence was offered on the proposed indictment. The Ninth Circuit was primarily concerned that courts should not interfere with the standard prosecutorial decisions concerning what evidence to present to the grand jury and how to present it. By requiring that grand jurors faithfully attend all sessions at which evidence is heard for their votes to count, this court's ruling does not interfere with prosecutorial discretion. Rather, this ruling aims to ensure that grand jurors faithfully attend all sessions at which evidence is heard so that the manner in which they arrive at their decision is fair.

F.2d at 607. This court believes, on the contrary, that the government can muster grand juries and schedule its cases with sufficient ease to allow it to adjust its procedures to comply with this decision.[6/] If grand jurors were told that their ability to cast a valid vote on an indictment hinges on their faithful attendance, then perhaps they would take their duties more seriously and appear at all sessions. It is not asking too much to require the faithful attendance of at least twelve out of

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6/ There is no rule that limits the government in impaneling grand juries. On the contrary, F.R.Crim.P. 6(a) provides that grand juries shall be summoned "at such times as the public interest requires." F.R.Crim.P. 6(g) specifically makes the grand jury's tenure and power independent of the term of court. Thus, the government retains significant control in summoning grand juries and should be able to obtain the appropriate juror attendance.

twenty-three members of a constitutionally mandated body exercising great power over peoples' lives. To demand less casts a disparaging light on the grand jury as an institution and endorses an appearance of unfairness which has no place in our system of criminal justice.

Because the instant indictment was returned by less than twelve informed grand jurors--i.e., by less than twelve jurors who attended all grand jury sessions--the indictment must be dismissed. The court feels that dismissal is mandated if the Fifth Amendment's provision for indictment by a grand jury is to have any meaning.

THEREFORE, IT IS ORDERED that the indictment be dismissed without prejudice.

APPENDIX C

F I L E D

Feb. 17, 1981
Richard H. Deane
Clerk, U.S. Court
of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. LEVERAGE FUNDING SYSTEMS, INC., a corporation, CENTAUR FILMS, a corporation, PETER S. TRAYNOR, an individual, WILLIAM G. McDONALD, JR., an individual, Defendants-Appellees.	)

No. 79-1677

DC No. CR 79-159-HP

ORDER

Before: FARRIS and NELSON, Circuit Judges, and JAMESON,* District Judge.

*Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Farris has voted to reject the suggestion for rehearing en banc and Judge Jameson has recommended rejection of the same. Judge Nelson has voted to grant the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.